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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NOE ABARCA, Plaintiff and Appellant, v. CALIFORNIA HOSPITAL MEDICAL CENTER, INC., et al., Defendants and Respondents.	B285197 (Los Angeles County Super. Ct. No. BC609749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Reversed.

Law Offices of Raymond L. Turchin, Raymond L. Turchin; Esner, Chang & Boyer, Stuart B. Esner, Joseph S. Persoff, and Steven T. Swanson for Plaintiff and Appellant.

Packer, O'Leary & Corson, Robert B. Packer, and Paul M. Corson for Defendant and Respondent Dignity Health dba California Hospital Medical Center.

Cole Pedroza, Kenneth R. Pedroza, Zena Jacobsen; Carroll, Kelly, Trotter, Franzen, McKenna & Peabody, Thomas M. Peabody, and Michael E. de Coster for Defendants and Respondents Antonio K. Liu, M.D. and White Memorial Medical Group, Inc.

INTRODUCTION

While a patient in defendant California Hospital Medical Center (California Hospital), plaintiff Noe Abarca suffered a stroke that ultimately resulted in paralysis on the right side of his body. After being admitted with initial symptoms of numbness and weakness, Abarca experienced delay between physician examinations as his right side grew more numb and weak. This delay occurred despite a standing order by the admitting physician to perform neurological checks every thirty minutes, and to contact the doctor if Abarca's condition worsened. As one would expect, Abarca was concerned and worried about the deterioration in his physical condition while hospitalized and when a doctor would be available to treat him.

Abarca did not pursue claim of medical negligence against his treating physicians, a medical group, and California Hospital until over a year and half after his hospitalization. Based on Abarca's feelings of concern and worry while hospitalized, three of those defendants moved for summary judgment and the trial court ruled in their favor, finding the action time barred. We reverse.

FACTUAL BACKGROUND

A. Medical Treatment

On June 22, 2014, Abarca arrived at California Hospital complaining of sudden weakness and numbness on the right side of his body. Dr. Antonio Liu examined Abarca, and concluded his patient had suffered a transient ischemic attack (colloquially referred to as a mini-stroke). Dr. Liu decided to admit Abarca, administer aspirin and Lipitor, order certain tests, and conduct frequent neurological tests. Dr. Liu also considered administering a tissue plasminogen activator ("tPA"), which is an FDA approved treatment for transient ischemic attacks that dissolves blood clots to improve blood flow to the brain. There is generally a limited time window in which to administer tPA before neurological damage gets too advanced. tPA's benefits as an anti-coagulant are not risk-free, and its side effects include potential hemorrhage. Dr. Liu decided not to administer tPA based on his observation that Abarca was clinically improving.

After initial improvement, Abarca's condition began to worsen and he was transferred to the intensive care unit (ICU). Around 5:00 p.m. on June 23, 2014, after an MRI did not reflect any recent infarct or hemorrhage, Abarca was transferred from the ICU to the telemetry unit. Dr. Liu ordered that the patient be checked every four hours, and that Dr. Liu be contacted regarding any neurological changes or worsening symptoms.

At 2:10 a.m. on June 24, 2014, Abarca suffered mid-chest pain and was given a painkiller. Three hours later, he complained of right arm numbness and weakness, and was treated for high blood pressure. At 6:20 a.m., he complained of a severe headache and was given pain medication. Forty minutes

later, Abarca was suffering from right side weakness and was unsteady on his feet. At 8:00 a.m., Abarca exhibited slurred speech, weakness in his right hand grip and leg, and right side facial droop. Dr. Liu was contacted at 9:35 a.m., and ordered an MRI. Dr. Liu learned of the MRI results at 11:20 a.m., which showed dead brain tissue indicating a stroke, at which point it was too late to administer tPA.

Abarca stayed at California Hospital until July 1, 2014, when he transferred to a rehabilitation center. He continues to suffer from paralysis on the right side of his body.

B. Abarca's Statements About His Medical Care

Abarca stated the following about his medical care when deposed. Abarca recalled being admitted to the hospital around 9:00 a.m. on June 22, 2014. As Abarca speaks Spanish and has limited English language proficiency, his daughter accompanied him to help communicate with doctors and nurses. Later in the day when he was first admitted, he recalled overhearing a discussion between his daughter and a doctor that "96 to 98 percent of people" in his situation could be given a certain shot, and "they would get better one-hundred percent" with only a small percentage left like he was. Abarca did not ask his daughter about the conversation while in the hospital, and she did not share any details with him about it.[1]

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[1] A "long time" after the hospital visit (Abarca was not questioned more specifically about the date), his daughter told him that the doctor said during this conversation they had four hours to give Abarca the shot, and after those four hours the shot was useless.

Abarca testified the stroke that led to his paralysis happened at around 5:00 a.m. on June 23, 2014.[2] When it happened, he asked the mother of his daughter, who was with him, to call a nurse. She was not able to do so because she spoke Spanish and the person in charge only spoke English. A nurse was eventually located. The nurse looked at Abarca, and tried to call a doctor, but no doctor was available. Abarca felt desperate and that his life was in danger, and was concerned no doctor was available because half his body was growing more and more numb. Abarca did not ask about the shot he heard mentioned the day before because he did not know what has happening to him. The hospital staff finally found somebody on duty (plaintiff did not know the doctor's name; the evidence showed this person was Dr. Suri), but by then he felt totally numb and could not move anything. Dr. Liu did not show up until around noontime—seven hours after the stroke occurred. Abarca "felt very bad" that "nobody showed up."

When directly asked whether he was concerned about the treatment he was receiving while in the hospital, Abarca said, "No, I was not concerned. I knew that I had doctors looking after me. And they are the ones that know."

PROCEDURAL HISTORY

Following the stroke and resulting paralysis, Abarca filed a workers' compensation action against his employer, alleging job related stress and that he suffered a stroke secondary to that

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[2] Plaintiff's expert submitted a declaration stating the stroke occurred at 5:00 a.m. on June 24. While it is possible Abarca had the dates confused in his testimony, whether the stroke was June 23 or 24 is not determinative of any issue before us.

stress. In July 2015, Abarca met with his workers' compensation attorneys. During that meeting, the attorneys suggested something was wrong with the medical treatment Abarca received while hospitalized.

Abarca filed suit in February 2016 alleging a single cause of action for medical negligence against Dr. Liu and other treating physicians, a medical group (White Memorial Medical Group, Inc. (White Memorial)), and California Hospital. Abarca alleged that the defendants negligently and willfully failed to timely and properly diagnose his true medical condition, and failed to timely and adequately treat said condition, resulting in injury.

A. Demurrers on Statute of Limitations Grounds

Abarca's initial complaint was silent with regard to delayed discovery. He then amended his complaint to allege, without further explanation, that he did not discover he had a meritorious cause of action until July 2015. A demurrer to that first amended complaint was sustained with leave to amend, based on a failure to set forth sufficient facts regarding when and how Abarca allegedly discovered the defendants' negligence such that his suit was timely.

The second amended complaint alleged that Abarca has a grade school education and speaks only Spanish. Abarca alleged he did not discover the defendants' negligence until his workers' compensation attorneys had his case evaluated by a physician in July 2015. Those attorneys in turn informed Abarca that the defendants were negligent. Abarca alleged he did not suspect wrongdoing earlier than July 2015 because he went into treatment with the same symptoms and condition he now has.

Abarca alleged that it was not until July 2015 that he understood his condition was reversible when he was first seen by the defendants, and is now permanent because of their alleged negligent treatment. The trial court overruled a demurrer to Abarca's second amended complaint, finding these allegations sufficiently alleged delayed discovery of his injury.

B. Motions for Summary Judgment

After discovery, Dr. Liu, White Memorial, and California Hospital moved for summary judgment on the standard of care and causation as well as the statute of limitations.[3] With regard to the statute of limitations, defendants relied on Abarca's deposition statements about his concerns while hospitalized over the delay in receiving medical attention. California Hospital further asserted that Abarca's daughter acted as his agent, and that she (and therefore plaintiff) was on notice as of June 22, 2014 there was a four-hour window for tPA to be administered.

Abarca argued there were triable issues of fact preventing summary judgment. In particular, he pointed to the trial court's order overruling the demurrer to the second amended complaint on statute of limitations grounds, and to his deposition testimony that he was not concerned with his treatment while in the hospital because "I knew that I had doctors looking after me. And they are the ones that know."

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[3] Defendants Liu and White Memorial filed one motion, and defendant California Hospital filed a separate motion. Because it granted summary judgment on statute of limitations grounds, the trial court found it unnecessary to address the issues of standard of care or causation.

C. Trial Court Ruling

The trial court found the moving defendants had adequately referenced undisputed evidence that plaintiff's single cause of action was untimely to shift the burden to plaintiff to demonstrate disputed issues of fact. In examining plaintiff's two pieces of proffered evidence, the court first noted the rule that a party cannot rely on his own pleadings (here, the second amended complaint and the related court order that it properly alleged delayed discovery) as evidence in opposition to a summary judgment. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.) The court found the portion of deposition testimony offered by plaintiff was vague and equivocal, and therefore insufficient to raise a triable issue of fact. The trial court accordingly granted summary judgment in favor of Dr. Liu, White Memorial, and California Hospital.

Plaintiff Abarca timely appealed.

DISCUSSION

A. Applicable Legal Standards

1. Summary Judgment

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc.,[4] § 437c, subd. (c).) A trial court's order granting summary judgment is reviewed de novo. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 643.) We decide independently whether the

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[4] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

facts not subject to triable dispute warrant judgment for the moving party. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.) We consider the evidence in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703.) Doubts are resolved in favor of the party opposing summary judgment. (*Frank and Feedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 469.)

The statute of limitations is an affirmative defense. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1188.) Accordingly, the defense " 'has the initial burden to show that undisputed facts support summary judgment' " based on the statute of limitations. (*Ibid.*) The burden then shifts to the plaintiff to counter with evidence creating a dispute about a fact relevant to that defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

2. Statute of Limitations

Section 340.5 provides that for a claim of medical negligence, "the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence could have discovered, the injury, whichever occurs first." There is no dispute section 340.5's one year from discovery provision applies here. The contested issue is whether undisputed facts show Abarca discovered, or through the use of reasonable diligence should have discovered, that his injury was caused by wrongdoing more than one year before he filed suit on February 17, 2016.

3. Suspicion of Wrongdoing

Under section 340.5's one-year discovery provision, the statute of limitations begins to run when the plaintiff suspects or should suspect that his or her injury was caused by wrongdoing. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110; *Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823.) "It is a plaintiff's *suspicion* of negligence, rather than an expert's *opinion*, that triggers the limitation period." (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1300.) The essential inquiry is when the plaintiff suspects negligence by a medical professional, not when he or she learned precisely how the defendant was negligent. (*Dolan*, *supra*, 13 Cal.App.4th at p. 824.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights." (*Jolly*, *supra*, 44 Cal.3d at p. 1111.)

B. Defendants Did Not Met Their Initial Burden

Considering Abarca's deposition testimony in the light most favorable to him, and resolving doubts in his favor as the party opposing summary judgment, we do not consider his statements of worry and concern sufficient to carry defendants' burden at summary judgment to show that Abarca suspected medical negligence in June 2014.

Abarca was experiencing sudden weakness and numbness when admitted to the hospital. His condition then waxed and waned for a period of time. It improved temporarily, then deteriorated to the point he was placed in the ICU, then improved such that he was transferred out of the ICU to the

telemetry unit, then deteriorated again. At around 5:00 a.m. on June 24, it again took a turn for the worse. Abarca, like anyone else would in such a position, felt desperate and that his life was in danger. He was worried about what was going to happen to him, and when a doctor would arrive to see if something could be done. When the condition progressed faster and the doctor still was not there, he felt bad.

It is possible to read Abarca's statements, as defendants argue (and the trial court found), as indicating Abarca was sufficiently concerned about the delay in his treatment to suspect wrongdoing. Given our obligation to consider the testimony in the light most favorable to Abarca, it is equally if not more plausible to read those statements not as suspicions of wrongdoing but as the natural response when experiencing a medical emergency—fear and concern over one's well-being, and desperation for a doctor to make it better. When the inferences to be drawn from certain evidence are ambiguous, as they are here, summary judgment is not appropriate. (*Aguilar*, *supra*, 25 Cal.4th at p. 856; see also § 437c, subd. (c) ["summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences . . . [that] raise a triable issue as to any material fact"].)

Furthermore, " 'summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence.' " (*Mason v. Marriage & Family Center* (1991) 228 Cal.App.3d 537, 546). When asked in deposition whether he was concerned about the treatment he was receiving while in the hospital, Abarca stated: "No, I was not concerned. I knew that I had doctors looking after me. And they are the ones that know." Abarca's statement that he was not

concerned about his treatment is consistent with his other testimony, if one considers that other testimony (as one reasonably could) to express fear and concern over his well-being, and desperation for a doctor to make it better, rather than a concern with the medical treatment he was receiving. Accordingly, there are triable issues of material fact regarding when the statute of limitations began running that preclude summary judgment.

C. There Is A Triable Issue of Fact Regarding Whether Abarca's Daughter Was His Agent

California Hospital separately argues that Abarca was on notice inquiry during his hospitalization because his daughter was acting as his agent, and was told that tPA was no longer an option because too much time had passed to administer it. The trial court agreed, finding Abarca should have known of the alleged malpractice through a family member acting as his agent.

California Hospital does not contend there was an express agency agreement between Abarca and his daughter. Instead it argues that an agency relationship can be implied based on conduct and circumstances. (*Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, 277.) " '[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation], and the primary right of control is particular persuasive.' " (*Ralphs Grocery Company v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262–263.) " 'The existence of an agency relationship is usually a question of fact, unless the evidence is susceptible of but a single inference.' " (*Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 401.)

In its separate statement, California Hospital's proof of agency consisted entirely of the following exchange at Abarca's deposition:

"Q [Your daughter] speaks English?

"A Yes.

"Q Would she do most of the talking to the doctors and nurses?

"A Yes.

"Q And did you want her to speak to them on your behalf?

"A Yes."

This evidence was an insufficient basis from which to find the type of agency claimed by California Hospital. When considered in the light most favorable to Abarca, and resolving doubts in his favor as the party opposing summary judgment, the existence of an agency relationship is not the only inference that can be drawn from this brief deposition exchange. Rather, the more reasonable inference is that given Abarca's limited English language skills and the hospital staff's limited Spanish language skills, he wanted his daughter to translate for him. Asking a family member to speak on one's behalf in order to navigate a language barrier, without more, is not undisputed evidence of a right of primary control with regard to medical decision-making, or the other indicia required to establish agency at the summary judgment stage.

As California Hospital did not carry its burden of adducing undisputed material facts to demonstrate agency, we need not address what Abarca's daughter did or did not know about tPA, or whether those facts (if any) placed the daughter on some type of inquiry notice attributable to Abarca.

D. Remand Is Appropriate With Regard to the Other Grounds on Which Defendants Moved for Summary Judgment

Before the trial court, defendants also moved for summary judgment arguing undisputed facts showed no violation of the standard of care or causation. In light of its statute of limitations ruling, the trial court did not reach those other issues. Nor did it rule on California Hospital's evidentiary objection to the declaration of plaintiff's expert. We have no transcript of the oral argument on the summary judgment motion from which to determine what, if anything, the parties argued or the court stated about the standard of care or causation. Nor did the parties brief anything other than the statute of limitations as part of this appeal. Accordingly, we decline to address the remaining issues in this appeal, and remand for the trial court to consider them in the first instance.

DISPOSITION

The judgment is reversed for further proceedings consistent with this opinion. Plaintiff is to recover his costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.